

# Summary

## **The remit and work of the Inquiry**

### *The remit of the Inquiry*

Directive 2014/67/EU of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), abbreviated as the Enforcement Directive, was adopted on 15 May 2014.

Our remit has been, *first*, to propose how to implement the Enforcement Directive in Swedish law and, *second*, to assess whether Swedish law is consistent with the Enforcement Directive and draft the legislative proposals needed to adapt Swedish legislation to the directive with regard to questions including:

- who is to be considered to be a posted worker;
- better access to information;
- administrative cooperation between authorities;
- national control measures;
- inspections and other monitoring;
- facilitation of complaints; and
- cross-border enforcement of administrative penalties,

The Inquiry's understanding is that it is part of its remit to also propose amendments to government ordinances when required.

The objective of the Enforcement Directive is to establish a framework of a set of appropriate provisions, measures and control mechanisms with the aim of better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC on the posting of workers in the framework of the provision of services (the Posting of Workers Directive) including measures to prevent and sanction any abuse and circumvention of the applicable rules.

Posting occurs when a company, which is established in a Member State, sends (posts) workers to another Member State in the framework of the provision of services by the company in the other Member State. Another precondition for posting is that that the worker temporarily performs work in a Member State other than the State in which the worker is habitually employed.

Posting is a cross-border activity that raises many different questions at the same time; political, economic, social and legal questions. Along with the Enforcement Directive, the Posting of Workers Directive forms the bounds for this Inquiry. The special problem that posting of workers can entail in matters such as tax, statutory social insurance and public procurement thus fall, in principle, outside the remit of the Inquiry.

### *Work of the Inquiry*

The Inquiry was staffed and was able to start its work at the end of August 2014. Its report is to be presented by 28 February 2015 at the latest. On 27 November the Inquiry was given a supplementary remit<sup>1</sup>, on which it is to report one month later, i.e. 31 March 2015. The work of the Inquiry has been intensive and multifaceted. Its remit has included many different issues of varying character. The Inquiry has also had the task of conducting dialogue with:

- the social partners (reference group);
- relevant agencies; and

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<sup>1</sup> Supplementary terms of reference to the Inquiry on new rules for posting of workers (A 2014:04), terms of reference 2014:150.

- the Posting of Workers Committee (A 2012:03).

The inquiry has also been tasked with gathering relevant information about the situation in other EU Member States and the Nordic countries.

The Government has appointed a number of experts from the Government Offices and government agencies to serve on the Inquiry.

In view of the short time available and the range of the issues to be covered, the Inquiry has worked very close to both the experts and the reference group, which have contributed a great deal of factual information, knowledge and other supporting material.

The Inquiry is now presenting an interim report containing deliberations and proposals regarding its original remit.

## **About the Enforcement Directive**

The Posting of Workers Directive was adopted on 16 December 1996. It establishes that certain terms and conditions of employment that are applicable in the host state (the hard core) shall be applied when an employer posts workers in another Member State. However, the Posting of Workers Directive does not contain the material provisions that shall be applicable within the hard core since the content of the material provisions varies between Member States. Nor is the Directive intended to harmonise the content of the material provisions in the hard core in the different Member States.

The objective of the Enforcement Directive is to ensure the better and more uniform implementation, application and enforcement in practice of the Posting of Workers Directive by establishing a framework of appropriate provisions and measures. The purposes of the measures include preventing any abuse and circumvention of the applicable rules and making it possible to enforce cross-border administrative penalties. The Enforcement Directive is intended both to guarantee protection for the rights of posted workers and to remove unnecessary barriers to the freedom to provide services.

## Our proposals

We propose that provisions intended to implement the Enforcement Directive be introduced in acts of law and in government ordinances. A new act and a new ordinance on mutual assistance in the recovery of certain administrative penalties are proposed, as are amendments to the Posting of Workers Act (1999:678) and to the Ordinance on a reporting obligation on the posting of workers (2013:352) and elsewhere. We propose that the name of the latter be changed to the Posting of Workers Ordinance. In certain areas the Inquiry makes the assessment that current Swedish law meets the requirements of the Enforcement Directive. In these areas the Inquiry does not propose any measures.

Our remit has been restricted to assessing whether the current law is in agreement with the Enforcement Directive and proposing essential amendments when they are needed to comply with the Directive. So we have not had the task of proposing measures that go beyond what is required by the Enforcement Directive.

### *Stronger possibility of recovery*

Our proposal for the implementation of the Enforcement Directive means the introduction of a possibility of enforcing, across the borders of Member States, administrative penalties for failure to comply with provisions on the posting of workers. This concerns penalties because a company has not complied with the provisions that the company is obliged to follow under the Posting of Workers Act.

Under the proposal, administrative penalties imposed in, for example, Sweden can be recovered in another Member State. If an administrative penalty is imposed on a company that has posted workers in Sweden because the company has not complied with the Swedish rules that apply to the posting of workers, the penalty can be recovered in the Member State where the company is established or performs activities. It will thus be possible to recover the penalty in that Member State through the Swedish Enforcement Authority with the assistance of the authorities in another Member State. This means that there is a need of mutual cooperation between Member States. Sweden shall therefore give other Member States

corresponding assistance to recover administrative penalties imposed in another Member State.

The proposals contribute to better regulatory compliance. The companies that do not want to follow the regulations, or are unable to do so, will not be able to get away with this, and will have to adapt their activities instead. Greater regulatory compliance also leads to competition on equal terms

### *Increased possibility for posted workers to assert their rights in Sweden*

Our proposals increase the possibilities for posted workers to assert their rights in Sweden. Today there is no right for posted workers who are not members of the employee organisation that is the party to the collective agreement to assert rights under collective agreements entered into in Sweden by the company posting the workers.

Our proposals mean that posted workers will be able to cite terms and conditions of employment under collective agreements made between a Swedish employee organisation and an employer that is established in another country and that posts workers in Sweden even when the worker is not a member of the organisation that is the party to the agreement. This is provided that the terms and conditions of the employment are covered by the hard core under the Posting of Workers Directive. Under our proposal, the worker will only be able to cite the collective agreement for the period during which the posting lasts or has lasted. The worker will be able to bring legal action at a Swedish court in order to assert their rights.

The proposal means that if a company that posts workers in Sweden enters into a collective agreement in Sweden containing, for example, terms and conditions about pay and working time that are more favourable than those under the contract between the company and the worker who is posted in Sweden, the worker can assert the more favourable terms and conditions under the collective agreement. This will thus be possible even though the worker has not joined the Swedish employee organisation that is the party to the collective agreement. The worker can bring legal action at a Swedish court in order to assert their rights.

*Greater protection against reprisals*

We propose giving a posted worker protection against reprisals by the employer if the worker brings legal action at a Swedish court about the terms and conditions of employment that the worker is entitled to. A provision to this effect will be introduced into the Posting of Workers Act.

We also propose that a posting employer who subjects the worker to reprisals shall pay damages to the worker for the loss incurred and the violation that has occurred. Provisions to this effect will be introduced into the Posting of Workers Act. We consider that the sanction we are proposing is effective, proportional and dissuasive in the sense of Article 20 of the Enforcement Directive. The purpose of the provisions is to protect the posted workers in accordance with what is stated in Article 11(5).

We also propose the introduction of a rule of evidence to the effect that if a person who considers that they have been subjected to reprisals by their employer demonstrates circumstances that give reason to presume that this is the case, it is up to the employer to show that such reprisals have not been taken. The above proposals are supplemented with time-bar provisions. The proposals give posted workers a real possibility of asserting their rights.

*Clearer definition of posting*

We propose that provisions be introduced into the Posting of Workers Act that clarify what circumstances can be taken into account when assessing whether there is an actual posting. These circumstances relate to whether a posting meets the requirements of establishment and temporary basis. The provisions shall state, first, that when an assessment is made of whether an employer is established in a country other than Sweden, the circumstances regarding the employer's activities in the other country and, when required, the employer's activities in Sweden shall be taken into account. Second, the provisions shall state that the circumstances that characterise the work and the worker's situation shall be taken into account when assessing whether a worker is performing work in Sweden during a temporary period. We propose that the preparatory works to the Posting of Workers Act set out a number of

examples of circumstances that can be taken into account in such assessments.

*Better access to information and greater cooperation*

We also propose giving the Swedish Work Environment Authority a clearer remit to provide clear and accessible information about the terms and conditions of employment that can be applicable in Sweden when workers are posted here. The information should also be available to people with disabilities. We propose the inclusion in the Posting of Workers Act of a provision about information that makes it clear that the Government issues regulations about what the information is to contain and how it is to be provided.

We also propose giving the Work Environment Authority a new task of cooperating with other Member States through the Internal Market Information System (IMI). The Work Environment Authority will then be given an obligation to provide assistance at the request of another Member State concerning, for example, information and inspections regarding a posting situation. Since all Member States are introducing similar obligations, the Work Environment Authority will have a corresponding possibility of requesting such assistance from a foreign authority, when required.